85-788

No. ——

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH BOGARAT,

Petitioner,

v.

MARK ANTHONY EMERSON, WILLARD W. EMERSON, d/b/a WILLARD EMERION & SONS, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, ALEC JUDD NICHOLS and SUSAN V. NICHOLS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the Southern District of Georgia abuse its discretion in admitting evidence of Petitioner's conviction for certain crimes when Petitioner had been released from any confinement relating to those convictions for more than ten years and did the United States Court of Appeals for the Eleventh Circuit err in affirming the District Court's ruling?

2. Did the United States District Court for the Southern District of Georgia err in giving an accident charge under the facts of this case and did the United States Court of Appeals for the Eleventh Circuit err in affirming the District Court's decision in this regard?

3. Did the United States District Court for the Southern District of Georgia err in refusing to give the Petitioner's charge on last clear chance and in ruling that the Petitioner was without any negligence and did the United States Court of Appeals for the Eleventh Circuit err in affirming the District Court's decision in this regard?

4. Was the Petitioner denied a fair trial by the closing argument made by counsel for the Respondents which counsel stated that Petitioner was guilty of manipulating the system and implied that Respondents Alec Nichols and Susan Nichols were not really bankrupt and did the United Stated Court of Appeals for the Eleventh Circuit err in refusing to grant relief to the Petitioner on this point?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
BASIS FOR FEDERAL JURISDICTION BELOW	5
ARGUMENT	5
CONCLUSION	11
APPENDIX	1a

TABLE OF AUTHORITIES

FEDERAL CASES: Page

Mealy v. *Slaton Machinery Sales, Inc.*, 508 F.2d 87 (5th Cir. 1975) 9

Sun/Fun Products v. *Suntan Research & Development, Inc.*, 656 F.2d 186, 189 (5th Cir. 1981) 9

STATE CASES:

Chadwick v. *Miller*, 169 Ga. App. 338, 343 (1983) 8

STATUTES AND RULES:

28 U.S.C. Section 2101(c) 2

28 U.S.C. Section 1332(a)(1) 5

Rule 609 of the Federal Rules of Evidence 2, 5

O.C.G.A. Section 46-7-12(e) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. —

JOSEPH BOGARAT,

Petitioner,

v.

MARK ANTHONY EMERSON, WILLARD W. EMERSON, d/b/a WILLARD EMERION & SONS, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, ALEC JUDD NICHOLS and SUSAN V. NICHOLS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS

The District Court entered no written order in this matter but made several rulings from the bench that are at issue. The relevant portions of the trial transcript containing those rulings is contained in the Appendix. The opinion of the Court of Appeals for the Eleventh Circuit is not reported and is contained in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on August 2, 1985, a copy of which is attached hereto in the Appendix. A Petition for Rehearing was denied by Order dated September 9, 1985, a copy of said Order is attached hereto in the Appendix. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

Rule 609 of the Federal Rules of Evidence provides in certain part:

> Evidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the latter date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

STATEMENT OF THE CASE

This case arises out of an automobile collision that occurred on December 3, 1981 on Interstate Highway 16 outside the city of Savannah, Georgia. Petitioner was a passenger in the car driven by Respondent Alec Judd Nichols. That car was struck by a dump truck being driven by Respondent Mark Anthony Emerson.

At the time of the incident in question, Mark Anthony Emerson was working for his father Willard W. Emerson, d/b/a Willard Emerson & Sons. (T. 41-

42) Willard Emerson, d/b/a Willard Emerson & Sons was operating on the roads of Georgia under a certificate of convenience and necessity issued by the Georgia Public Service Commission. (T. 163) The American Casualty Company of Reading, Pennsylvania was made a direct Defendant pursuant to O.C.G.A. § 46-7-12(e) in light of the certificate of convenience and necessity and it was stipulated at trial that the limits of the insurance issued by the American Casualty Company of Reading, Pennsylvania were $300,000. (Tr. 163)

When the collision occurred, Mark Anthony Emerson was involved in hauling dirt to a construction project on Hutchinson Island from a borrow pit some distance up Interstate 16 (T. 42) and was being paid by the number of loads he hauled. (T. 430-44) At the time of the accident, the truck driven by Mark Anthony Emerson was fully loaded and weighed somewhere in the neighborhood of 70,000 pounds. (T. 59) Mark Anthony Emerson admitted that he never put his brakes on. (T. 48).

The Petitioner, as a nondriving passenger, asserted a theory of concurrent negligence against Respondents Mark Anthony Emerson and Alec Judd Nichols. Mr. Nichols testified at trial that he had passed the truck and was easing back into the right hand lane when the collision occurred. (T. 114) Mr. Nichols testified that he was a safe distance in front of the truck when he pulled back in to the right hand lane. (T. 123) In his opinion, the truck could have avoided the collision by either slowing down or pulling over into a wider section of the road. (T. 113-15) Mr. Nichols' testimony was supported by the testimony of

Mr. Bogarat and disputed by the testimony of Mark Anthony Emerson and of another eyewitness, Gene Mason. In their answer, Respondents Mark Anthony Emerson, Willard W. Emerson, d/b/a Willard Emerson & Sons, and the American Casualty Company of Reading, Pennsylvania alleged contributory negligence on the part of the Petitioner. (R. 19-22) At trial, the Respondents attempted to alleged that Petitioner was negligent for not wearing a seatbelt and for distracting Appellee Alec Nichols. (T. 190, 321, 325) The Respondents through their counsel also attempted to suggest that Petitioner had a duty to get Respondent Alec Nichols to slow down. (T. 190)

Immediately before trial, the District Court indicated that it would allow the Respondents to bring out the fact that Petitioner had been convicted of certain crimes more than ten years ago. The District Court's ruling was based on the fact that during discovery the Petition had denied those convictions. The Court limited its ruling as follows:

> I know it is prejudicial. But most evidence is. I am going to construct a rule this way. If Mr. Bogarat should assume the witness stand, and I would assume that he would, if he is confronted on cross-examination, and I am sure that he will be, did he tell a falsehood in his answer to interrogatories and in his depositions about previous, some convictions that occurred in the '40's and '50's, impersonating an officer, or whatever, and that is the extent. And if he says "yes, I did not relate that," that is the end if it. If he denies it, then we are going through every one of them. (T. 11)

In accordance with the District Judge's ruling, the fact of Petitioner's convictions and the fact that those

convictions had been denied on discovery were elicited on direct examination. (T. 165). Nevertheless, counsel for the Respondents brought up the convictions once again on cross-examination. (T. 179-80) The fact of Petitioner's convictions was also stressed in the Respondents' closing argument. (T. 395-96) In fact, counsel for the Respondents went ever further and accused the Petitioner in closing argument of "manipulating the system." (T. 400-01) This charge was evidently based on the fact that Respondent Alec Nichols, a citizen of the United Kingdom, had travelled from London to the United States on several occasions following his bankruptcy. This issue of Mr. Nichols' travels was repeatedly interjected into the case by the counsel for the other Respondents. (T. 103, 119, 129, 131, 400-01).

BASIS FOR FEDERAL JURISDICTION BELOW

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1).

ARGUMENT

A. The United States District Court For The Southern District Of Georgia Abused Its Discretion In Admitting Evidence Of Petitioner's Conviction For Certain Crimes When Petitioner Had Been Released From Any Confinement Relating To Those Convictions For More Than Ten Years And The United States Court Of Appeals For The Eleventh Circuit Erred In Affirming The District Court's Rulings.

Under Rule 609 of the Federal Rules of Evidence:

> [E]vidence of a conviction . . . is not admissible if a period of more than ten years has elapsed

> since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

In this case, the trial Court decided to admit the evidence of certain convictions of the Petitioner that were more than ten years old after it was shown that the Petitioner had denied those convictions on discovery. The fact that the Petitioner had been convicted many years ago of uttering certain checks was entirely irrelevant to the real issues before the trial Court. It is apparent from the medical testimony that was submitted by deposition that Mr. Bogarat suffered serious injuries following the accident in question and the issue before the jury was whether both drivers of the vehicles were in some part responsible for the collision. It can hardly be said that the probative value of the convictions under the facts of the present case "substantially outweighed" the prejudicial effect of allowing those convictions to be presented to the jury.

Assuming *arguendo* that the District Court was within its discretion in allowing testimony of the convictions, it is important to note that the trial court's ruling on the convictions were limited. The Court ruled:

> If Mr. Bogarat should assume the witness stand, and I assume that he would, if he is confronted on crossexamination, and I am sure that he will be, did he tell a falsehood in his answers to interrogatories and in his depositions about previous, some convictions that occurred in the '40's and

> '50's, impersonating an officer, or whatever, and that is the extent. And if he says "yes, I did not relate that", that is the end of it. (T. 11)

Despite this ruling, counsel for the Respondents proceeded to raise the issue of the convictions and the misstatements on discovery after those matters had already been brought to the jury's attention on direct examination. (T. 179) Counsel for the Respondents then stressed the convictions in closing argument. (T. 395-96) The emphasis placed on these convictions was grossly prejudicial to the Petitioner and prevented the jury from focusing on the real issues. The trial court's ruling allowing the convictions into evidence denied the Petitioner a fair trial and entitles the Petitioner to a new trial.

B. The United States District Court For The Southern District Of Georgia Erred In Giving An Accident Charge Under The Facts Of This Case And The United States Court of Appeals For The Eleventh Circuit Erred In Affirming The District Court's Decision In This Regard.

Over objection, the District Court gave the following jury charge:

> The fact that an accident happened does not raise a presumption of negligence on the part of any party, and does not create a right of recovery by Plaintiff. (T. 428, 442)

Despite initially agreeing with counsel for the Petitioner that such a charge was improper (T. 442), the trial court later decided not to correct the accident charge. (T. 446-48)

The defense of accident is now available in Georgia only when the evidence supports the finding that an

occurrence could take place "in the absence of negligence for which no one would be liable." *Chadwick v. Miller,* 169 Ga. App. 338, 343 (1983). It is apparent under the facts of this case that the injuries suffered by the Petitioner were caused by the negligence of some party or of several parties acting concurrently. It should be noted that Respondents Mark Anthony Emerson, Willard W. Emerson, d/b/a Willard Emerson & Sons, and American Casualty Company of Reading, Pennsylvania asserted in their answer that the Petitioner was guilty of contributory negligence. At trial, these Respondents raised the issue of whether the Petitioner was wearing a seatbelt and also suggested that the Petitioner distracted Mr. Nichols, thus contributing to his own injuries. (T. 325, 332-33) The District Court specifically allowed the Respondents to bring out the fact that Mr. Bogarat may not have been wearing a seatbelt. (T. 321)

Thus, since it is apparent that the injuries sustained by the Petitioner were caused by one or more of the Respondents or arguably in part by Petitioner's own negligence, the Court's charge on accident was misleading and requires a new trial.

C. The United States District Court For The Southern District Of Georgia Erred In Refusing To Give The Petitioner's Charge On Last Clear Chance And In Ruling That The Petitioner Was Without Any Negligence. The United States Court Of Appeals For The Eleventh Circuit Erred In Affirming The District Court's Decision In This Regard.

As noted previously, Respondents Mark Anthony Emerson, Willard W. Emerson, d/b/a Willard Emerson & Sons and American Casualty Company of Reading, Pennsylvania raised the issue of the Peti-

tioner's contributory negligence in their answer. The Respondents presented evidence as to the Petitioner's contributory negligence at trial. Specifically, the Respondents presented evidence that the Petitioner was not wearing a seatbelt and that the Petitioner distracted the driver of the automobile in which he was a passenger. Despite the evidence in the record of the Petitioner's negligence, the trial court refused to give a contributory negligence charge to or charge on the doctrine of last clear chance. (T. 197-98, 375, 441-42)

Assuming *arguendo* that a last chance charge would be improper in a case where the Plaintiff was guilty of no negligence, it is apparent under the facts of this case that there was a jury issue as to the negligence of the Petitioner. *See Mealy* v. *Slaton Machinery Sales, Inc.*, 508 F.2d 87 (5th Cr. 1975). The trial court in effect rendered a directed verdict on the issue of the Petitioner's negligence. A motion for directed verdict should be granted only when in viewing the evidence as a whole and all inferences therefrom in the light most favorable to the party opposing the motion, the district court determines that a reasonable jury could not reach a contrary verdict. *Sun/Fun Products* v. *Suntan Research & Development, Inc.*, 656 F.2d 186, 189 (5th Cir. 1981). Given the evidence presented by the Respondents, there was a jury issue as to the Petitioner's contributory negligence and a last clear chance charge, therefore, was appropriate. There was substantial evidence that Mark Anthony Emerson could have either slowed down or moved off to the side of the road once he became aware of the alleged negligence of Mr. Nichols or the Petitioner. (T. 113-15) Accordingly, it was a reversible

error for the trial court not to submit the Petitioner's proposed charge on last clear chance and the Petitioner is entitled to a new trial.

D. The Petitioner Was Denied A Fair Trial By The Closing Argument Made By Counsel For The Respondents, Which Counsel Stated That Petitioner Was Guilty Of Manipulating The System And Implied That Respondents Alec Nichols And Susan Nichols Were Not Really Bandrupt And The United States Court Of Appeals For The Eleventh Circuit Erred In Refusing To Grant Relief To The Petitioner On This Point.

In addition to emphasizing the Petitioner's past convictions, counsel for the Respondents in closing argument also accused the Petitioner and Respondent Alec Nichols of "manipulating the system." Without any basis in the record, counsel for the Respondent argued that Mr. Nichols was not really bankrupt. After a proper objection, the Court observed that there was no evidence in the record that the bankruptcy of Mr. Nichols was not validly granted and that in the absence of any such evidence, it should be presumed that the bankruptcy was validly granted. (T. 401) The prejudicial effect of Respondents' argument, however, had already been realized. When viewed in conjunction with the Respondents' arguments concerning the Petitioner's convictions, it is fair to assume that the jury was left with the impression following counsel's unfounded allegations that the Petitioner was somehow not entitled to recover from his severe and permanent injuries. The Respondents were in effect allowed to try Mr. Bogarat rather than to try the facts that were really in issue. This sort of trial strategy should not be tolerated and the prejudicial

effect of the Respondents' stategy mandates a new trial for the Petitioner.

CONCLUSION

Based on the above reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

ALAN S. GAYNOR
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(912) 236-2491

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[PUBLISH]

No. 84-8848

D.C. Docket No. 483-417

JOSEPH BOGARAT,

Plaintiff-Appellant,

versus

MARK ANTHONY EMERSON,
WILLARD W. EMERSON,
d/b/a WILLARD EMERSON & SONS,
AMERICAN CASUALTY COMPANY OF READING,
PENNSYLVANIA,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

(August 2, 1985)

Before VANCE and HENDERSON, Circuit Judges, and ALLGOOD,* District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

Judgment Entered: August 2, 1985

For the Court: Spencer D. Mercer, Clerk
By: WARREN A. GOOPS
Deputy Clerk

ISSUED AS MANDATE: SEP 17, 1985

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* Honorable Clarence W. Allgood, U. S. District Judge for the Northern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RULE 27. STAY OR RECALL OF MANDATE

(a) A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FRAP 41 shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion for rehearing en banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion for rehearing en banc is also treated as a panel rehearing under Rule 26(c) of these rules, the mandate is stayed until disposition of a timely filed petition for panel rehearing or suggestion for rehearing en banc unless otherwise ordered by the court.

Cross Reference: FRAP 41; 11th Cir.R. 17(c)(12) and (d)(10)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CV 483-417

JOSEPH BOGARAT

-VS-

MARK ANTHONY EMERSON, WILLARD W. EMERSON, d/b/a WILLARD EMERSON & SONS, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, ALEC JUDD NICHOLS and SUSAN V. NICHOLS

September 27, 1984

JURY TRIAL

VOLUME II of two

TRANSCRIPT OF PROCEEDINGS AND EVIDENCE BEFORE HONORABLE B. AVANT EDENFIELD

TRANSCRIPT REQUESTED BY: WALTER HARTRIDGE, ESQ.

APPEARANCES

FOR THE PLAINTIFF

WALTER HARTRIDGE, ESQ.
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Savannah, Georgia 31498

ROY E. PAUL, ESQ.
P. O. Box 2139
Savannah, Georgia 31498

. . . . . .

to, or plead nolo contendere to any crime?" That was an interrogatory. His answer was "No."

MR. HARTRIDGE: Your Honor, our position is that what that they're going to try to do is to try a man based on convictions over ten years old who was in a traffic collision, to try to just say you can't award him any damages because he was convicted over ten years ago of uttering worthless checks, so therefore, you shouldn't award him of anything.

THE COURT: Well, I am going——

MR. HARTRIDGE: That is grossly prejudicial.

THE COURT: I know it is prejudicial. But most evidence is. I am going to construct a rule this way. If Mr. Bogarat should assume the witness stand, and I would assume that he would, if he is confronted on cross examination, and I am sure that he will be, did he tell a falsehood in his answers to interrogatories and in his depositions about previous, some convictions that occurred in the '40's and '50's, impersonating an officer, or whatever, and that is the extent. And if he says "yes, I did not relate that", that is the end of it. If he denies it, then we are going through every one of them.

MR. HARTRIDGE: All right, sir. He will admit it.

THE COURT: I am sure he will. I do not want it dwelled on. That is the nearest I can fashion.

MR. MIKELL: Your Honor ruled on the worker's compensation—was the Court's ruling that we cannot mention it in any

. . . . . .

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CV 483-417

JOSEPH BOGARAT

-VS-

MARK ANTHONY EMERSON, WILLARD W. EMERSON, d/b/a WILLARD EMERSON & SONS, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, ALEC JUDD NICHOLS and SUSAN V. NICHOLS

September 26, 1984

JURY TRIAL

VOLUME I of two

TRANSCRIPT OF PROCEEDINGS AND EVIDENCE BEFORE HONORABLE B. AVANT EDENFIELD

TRANSCRIPT REQUESTED BY: WALTER HARTRIDGE, ESQ.

APPEARANCES

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ROY E. PAUL, ESQ.
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Savannah, Georgia 31498

• • • • • • • • • • •

[428] I will now explain the law more precisely that you are to apply to this case.

At the core of this case is whether one or more parties was negligent. The fact that an accident happened does not raise a presumption of negligence on the part of any party, and does not create a right of recovery by plaintiff. In order for the plaintiff to recover, he must show by a preponderance of the evidence that both the accident and his injuries were proximately caused by the negligence charged against the defendants, one or more of the defendants.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonable prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, or in order to avoid injury to themselves or their property, or the persons or property of others.

Proximate cause is that which, in the natural and continuous sequence, unbroken by other causes, produces an event, and without which the event would not have occurred. It is that which is nearest in the order of responsible causes, as

• • • • • • • • • • •

[441] Of course, you cannot find, say, the American Casualty Company of Reading, Pennsylvania liable unless you find Mark Anthony Emerson, the driver of the vehicle. Neither can you find Susan V. Nichols liable unless you find Alec Judd Nichols liable, the driver of the vehicle.

If you designate either group as being responsible under the law and the charge, just make a check. That will be construed to mean that you find this group of defendants' negligent. The other verdict is a more simple verdict. It says, "special verdict".

"We, the jury find in favor of the defendants".

And, these will be out with you.

Marshal, I am going to ask you to take the jury to the jury room momentarily. I will see if the lawyers feel that I have overlooked anything that I told them I would instruct. And then we will take them to lunch.

[*NOTE:* WHEREUPON, the jury retired to the jury room.]

THE COURT: Have a seat. For the plaintiff?

MR. HARTRIDGE: May it please the Court, Your Honor, as have previously observed, did not charge last clear chance. Also, Your Honor, you indicated that you might adjust your charge at page A-B, the bottom by taking out the statement that the defendants were contending that the plaintiff was negligent. Now, under the Court's construction of the law, a finding of negligence on the part of the plaintiff, Mr. Bogarat, [442] would have to be made in order to trigger the last clear chance charge. And Your Honor has found and charged in effect no negligence on the plaintiff, therefore, the Court didn't charge last clear chance.

We submit that because of the pretrial contentions and the pretrial order of the defendants, particularly the Emerson group defendants, and the testimony that those matters should not have been withdrawn. And we were entitled to the charge on last clear chance.

Now, accident charge at page C—I should have picked this up before—but at the top of page C, Your Honor charged

> "The fact that an accident happened does not raise a presumption of negligence on the part of any party, and does not create a right of recovery by plaintiff".

We submit that an accident charge can't be given when somebody obviously was negligent.

THE COURT: Well, that is true.

MR. HARTRIDGE: I should have picked that up. I'm not trying to sandbag the Court.

THE COURT: Well, I will probably just tell the jury forget anything about accident. There is no allegation, as I know of, that it happened from some act of God, or whatever.

MR. HARTRIDGE: That's one point, Your Honor. Now, there's another point, that is, in Your Honor's charge on concurrent negligence, I think it arose in this way—at the [443] bottom of page D, Your Honor charged:

> "If you find that one of the defendants was negligent in at least one respect, and that this negligence, joined together with the negligence of a third person, proximately caused the collision",

I know that we requested that at a time when the bankruptcy of the Nichols left us in a quandry, but really, we respectfully submit that now, in view of the way the whole case has been treated, it ought to just read: "joined together with the negligence of another defendant".

THE COURT: Well, I thought about that, but I left it in there. "Third party", I mean to be another defendant.

MR. HARTRIDGE: Another defendant, namely Nichols.

THE COURT: Surely.

MR. HARTRIDGE: We characterized it that way because of this bankruptcy conundrum.

THE COURT: Well, I do not think I will make any change on that. I think it is clear enough.

MR. HARTRIDGE: Then, on the instructions, we would respectfully submit that the special verdict form in favor of the defendants period, they couldn't find that because somebody was negligent toward Mr. Bogarat, who wasn't negligent at all.

And the next one is when you charged them on the special verdict form itself, you said——

THE COURT: Well, Mr. Hartridge, they vigorously

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8848

JOSEPH BOGARAT,
Plaintiff-Appellant,

versus

MARK ANTHONY EMERSON, WILLIARD W. EMERSON d/b/a WILLARD EMERSON & SONS, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING

(September 9, 1985)

Before VANCE and HENDERSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge.

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

No. 85-788

Supreme Court, U.S.
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Southern District of Georgia abused its discretion in permitting limited inquiry into previous felony convictions, after a determination that their probative value outweighed any prejudice and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

2. Whether the Petitioner has waived any complaint of error for failure to object to that inquiry into previous felony convictions and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

3. Whether the United States District Court for the Southern District of Georgia's instruction that the jury could not presume negligence was a proper statement of the law in Georgia and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

4. Whether the United States District Court for the Southern District of Georgia's refusal to charge last clear chance was a proper reflection of the law when there was no evidence that the petitioner was negligent and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

5. Whether the United States District Court for the Southern District of Georgia properly corrected any misconception caused by statements of

Respondents' counsel in his closing argument and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	V, VI
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES AND RULES

Federal Rule of Evidence 609 ..... 2, 4

Federal Rule of Evidence 103 5

FEDERAL CASES

United States v. Bryant, 480 F.2d 785 (2d Cir. 1973) 6

United States v. Cavender, 578 F.2d 528 (4th Cir. 1978) 4

United States v. Cohen, 544 F.2d 781 (5th Cir. 1977) 5

United States v. Forgione, 487 F.2d 364 (1st Cir. 1973) 6

STATE STATUTES AND RULES

O.C.G.A. § 24-4-1 7

STATE CASES

Atlantic Coast Line Ry. Co. v. Coxwell, 93 Ga. App. 159 (1955) 8

Boatwright v. Sosebee, 108 Ga. App. 19 (1963) 6

Chadwick v. Miller, 169 Ga. App. 338 (1983) ... 7

Chenall v. Palmer Brick Co., 117 Ga. App. 106 (1903) 7

Cobb v. Big Apple, 106 Ga. App. 790 (1962) 6

Cohran v. Douglasville Concrete Products, 153 Ga. App. 8 (1980) 6

Table of Authorities Continued

	Page
Forehand v. Pace, 146 Ga. App. 682 (1978)	7
Georgia Northern Railway Co. v. Hathcock, 93 Ga. App. 72 (1955)	8
Hay v. Carter, 94 Ga. App. 382 (1956)	7
Hirsch v. Chapman, 109 Ga App. 620 (1964) ...	8
Louisville & Nashville R. Co. v. Patterson, 77 Ga. App. 406 (1948)	8
Maloy v. Dixon, 127 Ga. App. 151 (1972)	7
Mealy v. Slaton Machinery Sales, Inc., 508 F.2d 87 (5th Cir. 1975)	8
Palmore v. Stapleton, 157 Ga. 691 (1981)	6
Stroud v. Willingham, 126 Ga. App. 156 (1972)	8
Trammel v. Williams, 97 Ga. App. 31 (1958) ..	6
Walker Hauling Co. v. Johnson, 110 Ga. App. 620 (1964)	8

STATEMENT OF THE CASE

Respondents will accept the Petitioner's rendition of the proceedings below, noting that the jury awarded the plaintiff $36,000.00 against Alec Judd Nichols and Susan V. Nichols.

Respondents will accept the Petitioner's rendition of the facts with these additional notations proffered in this Brief in Opposition to Petitioner's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The United States District Court for the Southern District of Georgia acted properly in permitting limited inquiry into the Petitioner's felony convictions for purposes of impeachment. The District Court properly determined that the probative value of the evidence outweighed any prejudice.

The District Court correctly instructed the jury that they may not presume negligence from the fact that a collision occurred. As there was no evidence of the Petitioner's negligence, the District Court properly referred to instruct on last clear chance. Any misconception caused by statements by Respondents' counsel were rectified by the District Court's instruction to the jury.

The Court of Appeals for the Eleventh Circuit did not err in affirming the District Court's decision.

ARGUMENT

A. The United States District Court For The Southern District Of Georgia Acted Properly In Permitting One Question And One Response As To Petitioner's Felony Convictions And The Eleventh Circuit Court Of Appeals Did Not Err In Affirming The Trial Court's Ruling.

Federal Rule of Evidence 609(b) provides in pertinent part:

> [E]vidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b) affords a trial court judge discretion to determine whether or not the specific facts and circumstances of a given case allow the introduction of evidence of criminal convictions occurring more than ten (10) years prior to the trial proceeding at hand. The United States District Court for the Southern District of Georgia properly permitted limited inquiry as to the petitioner's prior criminal convictions.

On two occasions, in his answers to interrogatories and in his first deposition, the petitioner lied about having any prior criminal convictions. It was not until the petitioner's second deposition that the following three felony convictions were addressed:

(1) A federal felony in 1946 for impersonating a Naval officer. Sentence was eighteen months. Time served was six months in federal prison in Chillicothe, Ohio.

(2) A Michigan state felony in late 1940's for "bad checks." Sentence was eighteen months. Time served was six months in Michigan State Prison.

(3) A New York state felony about 1955 for "Grand Larceny in the Second Degree, to-wit, uttering a fraudulent check for $200.00." Sentence was four years. Time served was two years at Attica State Penitentiary. (R. 156-157.)

The trial court held that the petitioner's lying on two occasions concerning his three prior criminal convictions brought his credibility into issue. (T. 9) The Court fashioned a ruling to which respondents' counsel adhered. The Court held that:

> "[I]f Mr. Bogarat should assume the witness stand, and I would assume that he would, if he is confronted on cross-examination, and I am sure that he will be, did he tell a falsehood in his answers to interrogatories and in his depositions about previous, some convictions that occurred in the 40's and 50's, impersonating an officer, or whatever, and that is the extent. And if he says 'yes, I did not relate that," that is the end of it. If he denies it, then we are going through every one of them." (T.11)

Respondents' counsel complied with the District Court's ruling. The entire error as asserted by Petitioner is contained in one question and one response:

MR. MIKELL:

> Q: Mr. Bogarat, after this lawsuit was filed, twice prior to today under oath in this lawsuit you have lied about old felony convictions from the 1940's and 1950's; is that true?
>
> A. I admitted that, yes, sir.

Respondents' counsel did not exceed the parameters outlined by the District Court.

Rule 609(b) requires that a District Court must find that the probative value of the conviction substantially outweighs its prejudicial impact, and that it support that finding with an identification of the specific facts and circumstances which underlie its decision. *United States v. Cavender*, 578 F.2d 528 (4th Cir. 1978). The District Court in the case at hand had available the briefs of both parties (R. 147, 156-160), and oral argument detailing specific facts and circumstances (T. 7-ll). The District Court took careful note that these convictions were indeed felony offenses and made a determination that the probative value of admitting this evidence outweighed its prejudicial effect (T. 9-11).

The Petitioner had lied under oath on two occasions about his three previous felony convictions. In his present action, there is no concern that the jury might misuse the prior convictions as evidence of guilt. With the civil proceeding involving divergent stories of how the automobile accident took place, the jury is entitled to hear that the Petitioner made sworn statements three months prior to trial that were false. The Petitioner's credibility was called into issue and the District Court properly allowed limited inquiry as to those convictions for impeachment purposes.

Although the District Court did identify the specific facts and circumstances underlying its decision, a lesser standard has been allowed where the record indicates that the trial judge made a thorough and thoughtful analysis of the issue and had based his conclusion upon various factors which were then before him. *United States v. Cohen*, 544 F.2d 781 (5th Cir. 1977), reh. den., 546 F.2d 907 (5th Cir. 1977); and cert. den., 431 U.S. 914 (1977). The record in the case at hand certainly depicts a careful analysis and a strictly fashioned rule (T. 8-11).

The District court properly permitted limited inquiry into the Petitioner's felony convictions and the Eleventh Circuit Court of Appeals did not err in affirming the District Court's ruling.

B. The Petitioner Has Waived Any Complaint Of Error As He Failed To Object Timely and Properly And The United States Court Of Appeals For The Eleventh Circuit Did Not Err In Affirming The District Court's Decision In This Regard.

Even assuming that the conviction testimony was erroneously admitted, the Petitioner did not timely object and thus has not waived any error. Federal Rule of Evidence 103 states the requirements for a timely objection to be considered on appeal. Error may only be predicated upon this particular ruling if: (1) a party's substantial right is involved *and* (2) a timely objection appears of record, stating the specific ground of objection. Rule 103(a)(1).

The Appellant did not object to the question eliciting his felony convictions (T. 179). He did object to more recent arrests, and was sustained (T. 179-180). His failure to object to that question is fatal to his assertion here that the testimony was illegally ad-

mitted. *See*, e.g. *U.S. v. Forgione*, 487 F.2d 364 (1st Cir. 1973), *U.S. v. Bryant*, 480 F.2d 785 (2d Cir. 1973).

Thus, the Petitioner has failed to preserve this issue on appeal and, on that basis, the trial court must be upheld.

C. The United States District Court For The Southern District Of Georgia's Instructions As To Negligence Was Not An "Accident Charge" And Was A Proper Reflection Of The Law And The Evidence. The United States Court Of Appeals For The Eleventh Circuit Did Not Err In Affirming The District Court's Decision In This Regard.

The Petitioner assigns error to the Court's jury instruction and broad brushes it as an "accident charge." First, the charge was not the usual accident charge. Secondly, assuming this Court were to extend the "accident charge" cases, the Petitioner has not demonstrated any harm. Thus, on either ground, the charge was properly given.

First, the objectionable charge was not an accident charge, but a negligence charge. The Court did *not* define "accident,"*Cohran v. Douglasville Concrete Products*, 153 Ga. App. 8 (1980); *Cobb v. Big Apple*, 106 Ga App. 790, 791 (1962). The Court did *not* instruct the jury that the plaintiff was barred from recovery in such an instance, *Trammell v. Williams*, 97 Ga. App. 31, 34 (1958). The Court did *not* teach the jury that the plaintiff could not prevail if the asserted negligence of another, whether or not a party, was the cause of plaintiff's injuries. *Palmore v. Stapleton*, 157 Ga. 691 (1981). The Court did not charge on any semblance of sudden emergency, *Boatright v. Sosebee*, 108 Ga. App. 19 (1963). Any one or

all of those instructions may have been overruled by *Chadwick v. Miller*, 169 Ga. App. 338, 344 (1983).

But the instruction complained of is not the standard "accident charge" discussed in *Chadwick, supra.* Rather, the trial court charged on presumption and negligence. The word "accident" is merely incidental; the Court could have substituted "collision" and rendered the same instruction, i.e.,

> The fact that [a collision] happened does not raise a presumption of negligence on the part of any party, and does not create a right of recovery by Plaintiff.

The charge correctly stated that the occurrence of an event does not permit a jury to presume negligence.

In an action for negligence, "[the] burden of proof rests upon the plaintiff to establish the negligence of the defendant and its causal relation to the claimed injury and damage. O.C.G.A. § 24-4-1; [Cits.]" *Maloy v. Dixon*, 127 Ga. App. 151, 154 fn.1 (193 SE2d 19) (1972) "The law raises no presumption whatever as to who was to blame. The burden is on the plaintiff to show that defendant was negligent." *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 108 (1903); *Forehand v. Pace*, 146 Ga. App. 682, 683 (1978). The instruction correctly stated the applicable law and its issuance was sound. See also *Hay v. Carter*, 94 Ga. App. 382 (1956).

If this Court were to expand and elaborate on the trial court's charge, converting it into an "accident charge," the Petitioner could still not prevail. The Petitioner has not demonstrated that the charge was

a misstatement of the law, misleading or confusing to the jury. Thus, the charge does not constitute reversible error and the jury's verdict should be sustained.

D. The United States District Court For The Southern District Of Georgia Properly Refused To Give A "Last Clear Chance" Instruction Because There Was No Evidence That The Petitioner Was Negligent. The United States Court Of Appeals For The Eleventh Circuit Did Not Err In Affirming The District Court's Decision In This Regard.

The "last clear chance" charge evolved from the case of *Louisville & Nashville Railroad Co. v. Patterson*, 77 Ga. App. 406 (1948).

That case has been revisited on numerous occasions. The rule that has survived is simply this: The last clear chance doctrine applies only when there is a negligent plaintiff. *Atlantic Coast Line Railroad Co. v. Coxwell*, 93 Ga.App. 159 (1955); *Georgia Northern Railway Co. v. Hathcock*, 93 Ga. App. 72 (1955); *Hirsch v. Chapman*, 109 Ga. App. 444 (1964); *Walker Hauling Co. v. Johnson*, 110 Ga. App. 620 (1964); *Stroud v. Willingham*, 126 Ga. App. 156 (1972); *Mealy v. Slaton Machinery Sales, Inc.*, 508 F.2d 87 (5th Cir. 1975).

The Petitioner meekly suggests that "there was a jury issue as to the negligence of the Appellant" without one citation to the record. If there was any such evidence, it escaped the court[1] and the plaintiff's attorney.[2]

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[1]THE COURT: Well, does the case law say that in order to bring a last clear chance charge the Plaintiff must be the driver?

The evidence was far to the contrary. The plaintiff Bogarat testified that he was a passenger on the right-hand side of Mr. Nichols' car (T. 168). Mr. Bogarat testified that he was not distracting Mr. Nichols in any way immediately prior to the contact of the truck (T. 169).

Thus, the trial court correctly noted the absence of any evidence that the Plaintiff was negligent and properly denied a charge on last clear chance. That ruling is in accord with the Georgia law and the evidence presented and must be upheld.

E. The United States District Court For The Southern District Of Georgia Properly Corrected Any Misconception Caused By Statements Of Respondents' Counsel In His Closing Argument And The United States Court Of Appeals Did Not Err In Affirming The District Court's Ruling.

The Petitioner alleges that Respondents' counsel's remarks in his closing argument about Petitioner's manipulating the system unfairly prejudiced his ability to recover. The Petitioner does not cite a single case authority for reversal on these grounds. Upon counsel

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(T. 197-198)

THE COURT: I think it would simply be that, from the evidence that I have heard, he is not responsible for the negligence if any of Mr. Nichols. (T. 198)

THE COURT: Well, I am not even going to charge regarding his negligence, because I have not heard anything that indicates he is negligent. (T. 198)

[2]MR. HARTRIDGE: . . . We've got a man, we submit, who is absence of negligence himself; . . . (T. 198)

MR. HARTRIDGE: . . . My client is sitting there as a guest passenger in the right front seat of a car. There's been no evidence that he did anything wrong, we submit. (T. 197)

for Petitioner's objection, the trial judge at the District Court level properly corrected any misconception the jury may have formed. The District Court acknowledged Respondent Mr. Nichols' certificate of bankruptcy and ruled that it was presumed to have been validly granted. He also informed counsel and the jury panel that there was no testimony concerning the Petitioner being in bankruptcy (T. 401).

Any misconception caused by statements of Respondents' counsel was corrected by the District Court at the trial.

CONCLUSION

The trial court properly permitted limited inquiry into previous felony convictions. The court determined that their probative value outweighed any prejudice.

The District Court judge correctly charged the jury. There was no "accident charge" given and a "last clear chance" charge was not permitted by Georgia law.

The District Court properly corrected any misconception caused by statements of Respondents' counsel in his closing argument.

For all these reasons, the Respondents urge this Court to affirm the jury's verdict against the Defendants Alec Judd Nichols and Susan V. Nichols, and to affirm the United States Court of Appeals for the Eleventh Circuit by denying the Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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